Supreme Court, U.S.
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06-7949

No. 06-

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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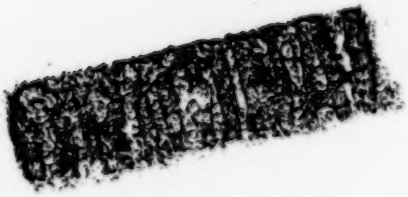

(C)

QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States* v. *Booker*, 543 U.S. 200 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Michael Gall respectfully requests that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 446 F.3d 884 and is reproduced in Appendix A to this Petition. The order of the district court is reported at 374 F. Supp. 2d 758 and is reproduced at Appendix B.

STATEMENT OF JURISDICTION

The Eighth Circuit denied Mr. Gall's timely petition for rehearing *en banc* on July 7, 2006. App. C. Pursuant to orders issued by the Court on September 19 and November 1, the time for filing this petition has been extended to November 22, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a), (c): Imposition of a Sentence

(a) *Factors to be considered in imposing a sentence.*—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * *

(c) *Statement of reasons for imposing a sentence.*— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * *

18 U.S.C. § 3742(e): Review of a Sentence

* * * *

(e) *Consideration.*—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection

(3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

* * * *

21 U.S.C. § 841(b): Prohibited Acts A

* * * *

(b) *Penalties*

* * * *

(1)(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *

21 U.S.C. § 846: Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner pleaded guilty to participation in a conspiracy to distribute ecstasy in the state of Iowa between February and September of 2000. *United States v. Gall*, 446 F.3d 884, 885-86 (8th Cir. 2006). After participating in the distribution ring for eight months, he voluntarily chose to cease all involvement in order to focus on his studies at the University of Iowa. *Id.* at 886. Over the course of the next two years, Petitioner graduated from college and started his own

business, during which time he was not involved with drugs and had no criminal record whatsoever. *Id.* In 2002, after Petitioner had moved to Arizona, federal agents approached him about his prior involvement in the ecstasy distribution ring. *Id.* Petitioner readily admitted his involvement and voluntarily made arrangements to return to Iowa in order to face charges. *Id.*

Based on the federal Sentencing Guidelines that were in effect when Petitioner's participation in the distribution ring ended in September 2000; the quantity of ecstasy for which Petitioner would be held accountable (stipulated as 2,500 grams); the Petitioner's minimal criminal history; the safety valve provision of U.S.S.G. § 5C1.2; and Petitioner's acceptance of responsibility, the trial court calculated a guideline range of 30 to 37 months' imprisonment. *Id.*

In addition to the factors weighing on the calculated guideline range, the court heard significant testimony from Petitioner's friends and family that he had matured significantly and learned from his mistakes in the two years since his temporary involvement in the ecstasy distribution ring. There was also evidence that employees of Petitioner's business depended on him for their livelihood. *Id.* at 887.

Petitioner was sentenced to three years probation. *Id.* The trial court concluded that Petitioner's "post-offense conduct [indicates] that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself." *United States v. Gall*, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005). The district court decided to impose a sentence below the recommended guideline range because "the offense level based solely upon drug quantity does not adequately reflect the offense conduct." *Id.* at 764 n.5. The court stated that Petitioner's voluntary cessation and exemplary lifestyle since his participation in the distribution ring were mitigating factors that justified downward departure under § 3553(a)(2)(A). *Id.*

On appeal, the Eighth Circuit reversed and remanded for resentencing, on grounds that the downward departure was not sufficiently supported by "extraordinary justifications." 446 F.3d at 889-90.

REASONS FOR GRANTING THE PETITION

In the opinion below, the Eighth Circuit found the district court's sentence to be unreasonable because the district court did not justify its downward departure from the Sentencing Guidelines with a finding of "extraordinary circumstances." *Id.* at 889. The Eighth Circuit Court of Appeals in *United States* v. *Claiborne* similarly held that the downward departure from the Guidelines' recommendation was not supported by "extraordinary circumstances" and vacated the district court sentence as a result. 439 F.3d 479, 481 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3243 (U.S. Nov. 3, 2006) (No. 06-5618). By granting certiorari in *Claiborne* and *United States* v. *Rita*, 177 Fed. App'x 357 (4th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3246 (U.S. Nov. 3, 2006) (No. 06-5754), this Court has acknowledged that the appropriate level of scrutiny that courts of appeal should apply when determining the "reasonableness" of sentences imposed by district courts requires review and clarification. By granting certiorari in *Claiborne* specifically, this Court has recognized the importance of clarifying whether it is appropriate after *United States* v. *Booker*, 543 U.S. 200 (2005), for district courts to be required to make extraordinary justifications when they elect to depart downward from the Guidelines.

Claiborne is a suitable vehicle for this Court to resolve the question of whether it is appropriate, in the wake of *Booker*, to require that sentences which deviate substantially from the Guidelines be justified by extraordinary circumstances. As such, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Claiborne* and then disposed of in light of that decision. However, should the Court determine that plenary review is appropriate in this case

as well as *Claiborne*, the matters should be consolidated for oral argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 22, 2006

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CERTIFICATE OF SERVICE

No. 06-

Brian Michael Gall,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this twenty-second day of November, 2006, I caused one copy of the Petition For A Writ Of Certiorari and In Forma Pauperis application in the foregoing case to be served by first class mail, postage prepaid, on the following party:

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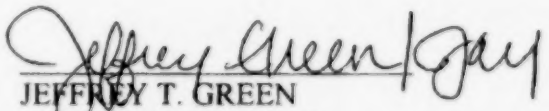

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3001

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Southern District of Iowa.
Brian Michael Gall,	*	
	*	
Appellee.	*	

Submitted: February 14, 2006
Filed: May 12, 2006

Before LOKEN, Chief Judge, BOWMAN and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Brian Michael Gall pleaded guilty to conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court imposed a sentence of 36 months' probation and a $100 special assessment. The government appeals the sentence, arguing that it is unreasonable. We conclude that Gall's sentence is unreasonable. Accordingly, we remand the case for resentencing.

I. *Background*

In February or March 2000, Gall entered into an agreement with Luke Rinderknect and others to distribute MDMA, also known as ecstacy. Initially, Gall

purchased 100 ecstasy tablets from Rinderknect on six occasions between February and May 2000. During this period, Gall traveled from Iowa City, Iowa, to Pell, Iowa, to purchase ecstasy from Rinderknect.

In May 2000, Rinderknect decided to move to Burbank, California. Before leaving Iowa, he arranged a meeting with Gall and Theodore Sauerberg to facilitate the ongoing distribution of ecstasy in his absence. During the meeting, the parties agreed that Sauerberg would accept delivery of ecstasy from Rinderknect and transfer the drugs to Gall. When Gall received the drugs from Sauerberg, he distributed them to other individuals, including Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. After receiving payment from his customers, Gall delivered the drug proceeds to Sauerberg. Sauerberg then delivered the cash to Rinderknect.

One month after the initial meeting in Iowa City, Rinderknect mailed a package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Sauerberg then distributed the ecstasy to Gall in 1,000 tablet increments. Pursuant to the agreement, Gall distributed the ecstasy to other individuals, including Coleman who purchased a total of 1,500 to 2,000 tablets. Gall knew his customers were redistributing the drugs within the community. As the drugs were distributed, Gall paid Sauerberg for the ecstasy. After Sauerberg collected the $85,000 purchase price from Gall, he contacted Rinderknect who flew to Iowa and obtained the cash.

Approximately one to two months later, Rinderknect mailed a second package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Again, Sauerberg distributed the ecstasy to Gall in 1,000 tablet increments. After distributing the ecstasy, Gall remitted $85,000 to Sauerberg, who delivered the money to Rinderknect.

In September 2000, Gall decided to leave the drug conspiracy. Rinderknect traveled to Iowa City and met with Gall. Gall told Rinderknect that he was getting out

of the drug business over concerns that Sauerberg was telling too many people about their ecstasy distribution business. Rinderknect sold no more ecstasy to Gall as he requested. According to Gall, he stopped selling ecstasy in August 2000 when he moved in with a new roommate and started studying for his major at the University of Iowa. Goodding testified that Gall stopped selling ecstasy in August 2000 because he did not like the trouble of having to deal with people. Gall estimated that he made $30,000 while a member of the ecstasy conspiracy.

After college graduation in 2002, Gall moved to Mesa, Arizona. Federal agents approached Gall in Arizona, requesting to speak with him about his involvement with ecstasy sales while living in Iowa. Unknown to Gall, law enforcement had already arrested Rinderknect and Sauerberg, who had implicated Gall. Gall admitted to the agents his involvement in the conspiracy. In 2004, Gall was charged in an indictment with conspiracy to distribute MDMA. Gall made arrangements to return to Iowa from his home in Winter Park, Colorado, when he learned there was a federal arrest warrant issued for him. Upon his return to Iowa, he turned himself in to federal authorities.

Because Gall withdrew from the conspiracy in September 2000, the parties stipulated that the November 1, 1999 edition of the United States Sentencing Guidelines applied to Gall's offense conduct. The presentence report ("PSR") assigned Gall responsibility for 10,000 tablets of ecstasy. The parties stipulated that for the purpose of calculating a Guidelines sentence, Gall would be held accountable for 2,500 grams of ecstasy, or 10,000 tablets, which under the 1999 Guidelines equals 87.5 kilograms of marijuana. Pursuant to U.S.S.G. § 2D1.1, 87.5 kilograms of marijuana placed Gall at a base offense level of 24. Because he qualified for the safety valve pursuant to U.S.S.G. § 5C1.2, Gall's offense level was reduced by two levels to 22. An additional three-level reduction for acceptance of responsibility resulted in a total offense level of 19.

Gall's criminal history included a conviction for failure to maintain control of his vehicle and underage alcohol possession in March 1997. As part of his sentence, Gall was ordered to pay a fine and undergo treatment for alcohol abuse. No criminal history points were assessed for this conviction pursuant to U.S.S.G. § 4A1.2(c). Gall was also convicted in December 1997 of improper storage of a firearm on a public highway. This conviction added one criminal history point pursuant to U.S.S.G. § 4A1.1(c). Finally, in March 2000, Gall was convicted of possession of marijuana for which he received a deferred judgment; no criminal history points were assigned to this conviction. With a Category I criminal history, Gall's advisory Guidelines range was 30 to 37 months' imprisonment.

At Gall's sentencing hearing, his father, Tom Gall, testified that he had observed a change in his son's life and that his son had started his own business and was doing well. He added that contractors rely on his son for expertise in installing windows. Finally, he commented that his family would be devastated if his son went to jail.

Gall's mother, Vicki Gall, testified that she believed her son realizes that he made a "stupid mistake" and that he has really learned from it. She added that during the last year, her son has become more mature. She concluded by questioning the value of incarcerating someone who had already made positive changes in his life.

Gall's counsel requested a sentence of probation, asserting that Gall was not in need of rehabilitation because he had already done an admirable job of rehabilitating himself. His counsel noted letters of support sent to the district court sent by Gall's friends and family. In addition, his counsel argued that a felony conviction is a severe consequence that would follow Gall throughout his life. Gall's counsel distinguished Gall from the codefendants who received prison sentences by noting Gall's withdrawal from the conspiracy and his assumption of a crime-free lifestyle. Counsel concluded his remarks by reminding the court that Gall's family, along with two

contract employees, "work pretty much exclusively for Mr. Gall" and were depending on Gall.

The government requested a sentence of 30 months' imprisonment, a sentence at the low end of the advisory Guidelines range. The government argued this sentence was appropriate, considering Gall already received a significant benefit by being sentenced under the 1999 Guidelines. In 1999, the Guidelines stated that 1 gram of ecstasy equated to 35 grams of marijuana. The current Guidelines equate 1 gram of ecstasy to 500 grams of marijuana, which is 14 times the conversion quantity that Gall faced. In addition, Gall's recommended sentence only included drug quantities for the period of his participation in the conspiracy not foreseeable drug quantities during the entire conspiracy. Also, Gall benefitted from a two-level safety-valve reduction. Finally, the government argued that a 30-month sentence was appropriate because the other coconspirators also received prison sentences.

Before announcing its sentence, the district court denied a defense request to depart from the advisory Guidelines range based upon aberrant behavior and extraordinary acceptance of responsibility. The court concluded that departure requests for remorse, post-offense rehabilitation, and voluntary cessation of criminal activity were best considered within the confines of 18 U.S.C. § 3553(a).

After considering the Guidelines, the district court stated, both at the hearing and in its subsequent sentencing memorandum, that it was going to impose a sentence other than that contemplated by the Guidelines and sentenced Gall to 36 months' probation. In imposing the sentence of probation, the court stated that it had considered the § 3553(a) factors. Particularly, the court stated that it took into account "the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of the defendant."

Regarding the nature and circumstances of the offense under § 3553(a)(1), the district court noted that Gall had withdrawn from the conspiracy, the offense did not involve violence or firearms, and the offense level was derived solely on the basis of drug amounts.

As to the character of the defendant, the court stated that all of Gall's criminal conduct, including the present offense, occurred when he was 21 years old or younger, citing the Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), that studies indicate that adolescents are less culpable than adults for their actions and "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualitites often result in impetuous and ill-considered actions and decisions." While acknowledging the decision's limited applicability to those who commit a death-eligible crime before the age of 18, the district court concluded that a National Institute of Health Study "confirms there is no bold line demarcating at what age full maturity is reached." Therefore, the court determined that Gall's age at the time of the offense should be considered in "discovering the overall characteristics of the defendant."

In addition, the court noted Gall's "exemplary" post-offense behavior, including earning his college degree and owning his own business. The court referred to the correspondence it had received, which described Gall as "reliable, honest, friendly, and polite" with "superior work ethic and valuable resources." The district court stated that it could "only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself."

Finally, under § 3553(a)(2)(A), the court considered the need for the sentence imposed to reflect the seriousness of the offense. The court stated that the best way to accomplish this goal was to impose a term of probation because "[a]ny term of imprisonment in this case would be counter effective by depriving society of the

contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life."

The district court sentenced Gall to a term of 36 months' probation as a reflection of "the seriousness of joining a conspiracy to distribute MDMA or Ecstacy." Recognizing that probation is not recommended when the Guidelines range falls outside of Zone A, the district court concluded that probation was nevertheless appropriate because Gall's offense level was based "solely on drug quantity." The court stated, "While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct."

The government now appeals, arguing that the sentence is unreasonable in light of all of the § 3553(a) factors because the district court (1) gave unreasonable weight to Gall's withdrawal from the conspiracy; (2) improperly relied on studies showing that adolescents are less culpable for their actions than adults; (3) gave unreasonable weight to Gall's post-offense rehabilitation and behavior while on pre-trial release; (4) failed to acknowledge that Gall's lack of criminal history was accounted for in the Guidelines calculation; (5) incorrectly concluded that a sentence of probation reflects the seriousness of the offense; (6) did not consider whether a sentence of probation affords adequate deterrence to future criminal conduct; and (7) did not consider whether a sentence of probation creates unwarranted sentencing disparities among defendants with similar records who committed similar crimes.

II. *Discussion*

"Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir. 2006). To determine the proper sentence, "the district court must first calculate the applicable guidelines sentencing range." *Id.*

After calculating the advisory Guidelines range, the district court "may then impose a sentence outside the range in order to 'tailor the sentence in light of the other statutory concerns' in § 3553(a)." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 245–46 (2005)).

In the present case, neither party challenges the district court's determination of the Guidelines sentencing range; therefore, "we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion." *Id.* at 481.

"We have determined that a sentence imposed within the guidelines range is presumptively reasonable." *United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006). "While it does not follow that a sentence outside the guidelines range is unreasonable," a sentence outside of the Guidelines range "'may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *Id.* at 417–18 (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

The district court must clearly explain why it imposed a sentence outside of the Guidelines range. *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). While we do not require "a rote recitation of each § 3553(a) factor," the district court should explain why it varied from the Guidelines and the extent of the variance. *Id.* "'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Claiborne*, 439 F.3d. at 481 (quoting *United States v. Johnson*, 427 F.3d 423, 426–27 (7th Cir. 2005)). Therefore, "the farther the district court varies from the presumptively reasonable guidelines

range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006).

Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months' incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *see also Claiborne*, 439 F.3d at 481 (holding that the district court's imposition of a 15-month sentence when the Guidelines range was 37 to 46 months' imprisonment, a 60% downward variance, was unreasonable). We conclude that this extraordinary variance is not supported by extraordinary justifications.

First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines. Gall was held responsible for 10,000 tablets of MDMA at a conversion rate of 1 gram of MDMA to 35 grams of marijuana, resulting in a base offense level of 24. Under the current Guidelines, however, Gall's base offense level would have been 32 because 1 gram of MDMA equates to 500 grams of marijuana. In addition, Gall was not held accountable for quantities of ecstasy distributed by other members of the conspiracy subsequent to his withdrawal. Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members' reasonably foreseeable acts. *United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) ("A defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts and omissions of any co-conspirator taken in furtherance of the conspiracy.").

Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. This general study, however, does not explain how Gall's specific behavior in the instant case was

impetuous or ill-considered. Furthermore, Gall sold ecstacy as a 21-year-old adult, not as an adolescent.

Third, the district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based "solely on drug quantity," the district court ignored the serious health risks ecstasy poses. Ecstasy causes increased body temperature, which can lead to liver, kidney, and cardiovascular system failure; increases in heart rate and blood pressure; and severe anxiety and depression, which can occur days or weeks after taking ecstasy. *National Institute on Drug Abuse,* (2003), *at* www.nida.nih.gov/infofax/ecstasy.html (last visited March 31, 2006). Gall sold 10,000 ecstasy pills during the time he participated in the drug conspiracy. The potential harm posed by this quantity of illegal drugs should not be lightly discounted.

Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(6). "Congress has made avoiding unwarranted disparity a legislative priority." *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). Therefore, we find that the district court failed to consider a relevant factor that should have received significant weight.

Finally, the district court placed too much emphasis on Gall's post-offense rehabilitation. Even if Gall's rehabilitation "is dramatic and hopefully permanent," a sentence of probation for participating as a middleman in a conspiracy distributing 10,000 tablets of ecstasy with a personal profit of $30,000 "'lies outside the limited range of choice dictated by the facts of the case.'" *Id.* (quoting *Haack*, 403 F.3d at 1004).

III. *Conclusion*

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court for resentencing.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN MICHAEL GALL, Defendant.	*	4:04-cr-116 SENTENCING MEMORANDUM

I. INTRODUCTION

On May 27, 2005, this Court sentenced the Defendant, Brian Michael Gall to a thirty-six month term of probation. This memorandum sets forth the methodology and reasoning for that sentence.

On March 2, 2005, the Defendant pleaded guilty to one count of conspiracy to distribute MDMA, also known as "ecstacy", a Class C felony. *See* 21 U.S.C. §§ 846, 841(b)(1)(C). In fashioning a sentence that is "sufficient, but not greater than necessary, [the Court must consider] the nature and circumstances of the offense and the history and characteristics of the defendant . . . ." 18 U.S.C. § 3553(a)(1). Further, the Court must consider the need for the sentence imposed, in that it should: reflect the seriousness of the offense, promote respect for the law, and provide just punishment; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). Along with these factors, the Court must determine the kinds of sentences available, including those advised by the Sentencing Commission. 18 U.S.C. §§ 3553(a)(3)-(5); *see United States v. Yahnke*, 395 F.3d 823, 824 (8th Cir. 2005) (requiring that a

sentencing court "must consult Guidelines and take them into account when sentencing"); *United States v. Mathijseen*, 406 F.3d 496, 498 (8th Cir. 2005) (reviewing a district court's interpretations of the Guidelines *de novo*, factual findings for clear error, and the final sentencing determination for reasonableness). The Court must also "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" and assess the need to provide restitution to victims. 18 U.S.C. §§ 3553(a)(6), (7). Finally, because a term of imprisonment is available in this case, the Court must heed the statutory admonition "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

II. DISCUSSION

A. Advisory Guidelines Range

The Presentence Report calculation, which the Court adopts, subjects the Defendant to a total offense level of 24 based on the quantity of 10,000 MDMA tablets stipulated to by the parties. This amount converts to 87.5 kilograms of marijuana. The Defendant, however, received a two-point reduction under U.S.S.G. § 5C1.2 for being "safety valve" eligible. The Defendant also received a three-point adjustment for acceptance of responsibility. Taking these reductions into account, the final offense level calculation is 19.

The Defendant's criminal history is minimal, falling into criminal history category one ("I"). The Defendant's single criminal history point arises from conduct when, at the age of eighteen, the Defendant paid a fine for failure to zip a gun bag, which lay inside a motor vehicle while on a hunting trip. The Defendant pled guilty to two other infractions, as will be discussed below, but the associated conduct did not earn the Defendant any criminal history points under the Guidelines. Accordingly, the

advisory Guidelines sentencing range for this Defendant is between 30 and 37 months.

B. Departure Motions

The Defendant made several motions for downward departures from the Guidelines calculation above based on the Defendant's age, cooperation with the government,[1] remorse, and post-offense rehabilitation. Because these factors are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a), they are denied. The Defendant also moves for a downward departure based on acceptance of responsibility. Since he has already received a three-point reduction for acceptance, that motion is also denied. *See* U.S.S.G. § 5K2.0(d) (prohibiting such a departure because it is already taken into account under § 3E1.1). Finally, the Defendant moves for downward departures based on the arguments that the Defendant's offense conduct was aberrant and that the Defendant voluntarily withdrew from the conspiracy well before the Indictment was filed in this case.

The Court cannot conclude the Defendant's offense conduct was aberrant behavior and, therefore, declines to downwardly depart on that basis. Under the policy statement, a court may depart downward "if the defendant committed a single criminal occurrence or single criminal transaction that: 1) was committed without significant planning; 2) was of limited duration; and 3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20. The facts, as stipulated by the parties, show that Defendant's offense conduct involved a conspiracy that

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[1] The Government filed no substantial assistance motion in this case. The Government conceded that, while the Defendant was receptive to providing testimony at the trials of co-defendants and other information, since his offense conduct occurred almost four years before the Indictment was filed, whatever information the Defendant could reveal was of little use. Ironically, by the time the Defendant provided information, the individuals he knew about had already confessed or were cooperating themselves.

lasted for at least seven months and included numerous criminal transactions. Conspiracy, by its very nature, almost completely forecloses a finding of aberrant behavior as a basis for downward departure because it invariably involves a degree of planning and is not, except in rare cases, an act of limited duration.

Neither can the Court find the Defendant's voluntary termination from the conduct prior to law enforcement intervention constitutes a basis for departing downward. The Defendant relies on *United States v. Nunemacher*, 362 F.3d 682, 689 (10th Cir. 2004), which allowed a district court to consider downwardly departing for a defendant's voluntary termination of criminal conduct before such conduct was brought to the attention of law enforcement. The Tenth Circuit reasoned that voluntary termination reflected that the criminal conduct was atypical and, therefore, worthy of consideration for a departure, if exceptional. *See id.* at 688 ("[V]oluntary termination of illegal activity and cooperation with law enforcement are already taken into account by an acceptance of responsibility adjustment . . . thus may not serve as a basis for departure unless [they] are present to an exceptional degree.") (citing *United States v. Benally*, 215 F.3d 1068, 1075 (10th Cir. 2000)). Voluntary termination likewise comes under consideration in the Eighth Circuit when a defendant's acceptance of responsibility is an issue. *United States v. Card*, 390 F.3d 592, 594 n.3 (8th Cir. 2004) (relying on a district court's application of U.S.S.G. 3E1.1 n.1(b) to determine whether a defendant accepted responsibility for his conduct). Here, the Defendant has already received a three-point reduction in his offense level for acceptance and his voluntary termination, after seven months and numerous criminal transactions, cannot be said to be so exceptional as to make his criminal conduct atypical. The Defendant's withdrawal from the conspiracy is better discussed within the confines of 18 U.S.C. § 3553(a).

C. Imposition of Sentence

1. *The Nature and Circumstances of the Offense*

The Defendant is charged with entering and exiting a conspiracy that involved the distribution of MDMA. The overall conspiracy occurred from May, 1996 to on or about October 30, 2002. The Defendant's involvement began with the purchase, for the purpose of distribution, of MDMA in February, 2000. The Defendant's involvement ended in September, 2000. In September, 2000, the Defendant informed a coconspirator that he was getting out of the drug business and wanted nothing more to do with the conspiracy. No other aggravating factors are present. None of the offense conduct involved violence, nor were firearms present. The offense level is derived solely on the basis of drug amounts. The Defendant believed that, up until the Indictment was filed in April, 2004, his criminal conduct was all part of the past.

2. *The Character of the Defendant*

The Defendant's criminal-history conduct has been alluded to and appears to stem from his addictions to drugs and alcohol. Other than the firearm offense discussed above, the Defendant pleaded guilty, at the age of eighteen, to failure to maintain control of his vehicle and was ticketed for underage drinking of alcohol. In March, 2000, contemporaneous with the time of the offense conduct in the present case, the Defendant pleaded guilty to possession of marijuana, for which he received a one year deferred judgment. In fact, all of the Defendant's criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger.[2]

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[2] Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not

To the Defendant's credit, he voluntarily and explicitly withdrew from the conspiracy in September, 2000.[3] In addition, the Defendant's post-offense behavior has been exemplary. The Defendant continues to wage a successful battle against drug and alcohol addictions; he has remained sober while on bond under pre-trial and pre-sentence release. After turning his back on the conspiracy, the Defendant earned his bachelor of science degree in computer science from the University of Iowa. The Defendant started, and continues to own and operate BMG Construction

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become complete until the age of twenty-five. *See* Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (summarizing a recent National Institutes of Health ("NIH") study that suggests "that the region of the brain that inhibits risky behavior is not fully formed until age 25"). This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of defendants increase. *See United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005). The Supreme Court based its most recent death penalty decision, *Roper v. Simmons*, on studies indicating adolescents are less culpable for their actions than adults. *See* 125 S. Ct. 1183, 1195 (2005) (stating that "as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' (citations omitted) It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'") (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992)). While the *Roper* court held imposition of the death penalty is unconstitutional for those persons who committed the death-eligible crime before the age of eighteen, the recent NIH report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.

[3] The Government estimates that the Defendant made between $30,000 and $40,000 during his time in the conspiracy. Like so many facts to be considered when a court imposes a sentence, this fact can be viewed from different perspectives. On the one hand, the Defendant should be punished for profiting from a criminal scheme. The Government argues that this can best be met by a sentence near the bottom of the advisory Guidelines sentencing range, i.e., thirty months imprisonment. On the other hand, the Defendant, who is from a working-class family and has few financial resources, decided to turn his back on what, for him, was a highly profitable venture. The Presentence Report, paragraph 72, characterizes the profits as "easy money." The Court can not consider, for the purposes of sentencing, one side of the financial aspect of the offense conduct without considering the other.

Services, which operates as a sub-contracting service for the installation of Pella-brand windows and doors. Representatives of the Pella Corporation have written to the Court describing the Defendant as "reliable, honest, friendly, and polite," with a "superior work ethic . . . and a valuable resource." Soon the Defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois. The Court has also received a small flood of letters from family, friends, and work colleagues attesting to the Defendant's character.

3. *The Need for the Sentence Imposed*

The Court can only conclude from Defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system, and has admirably moved to secure a better future for himself. The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA. This is best accomplished, in this case, by a term of Probation for three years with appropriate conditions. *See* 18 U.S.C. § 3561(a) (allowing for probation for offenses other than Class A or Class B felonies). The Court reminds the Defendant that "probation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense." *State v. Peckenschneider*, 236 N.W.2d 344, 353 (Iowa 1975) (McCormick, J., dissenting). The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if

he violates the conditions of his probationary term.[4]

Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life. Indeed, a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.

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[4] Along with the mandatory conditions of probation, the Court also provides the following conditions under 18 U.S.C. § 3563(b), which are in keeping with the factors set forth in §§ 3553(a)(1) and (a)(2): 1) You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office; 2) You shall not use alcohol and/or other intoxicants during and after the course of treatment; 3) You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer; 4) You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages; and 5) You shall work only at employment approved by the U. S. Probation Office. You shall consult the U. S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U. S. Probation Office.

III. CONCLUSION

The introductory commentary to Part B - Probation of the Sentencing Guidelines states that: "Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet the fully statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." The Court recognizes that, according the Sentencing Guidelines, Probation is not recommended when, as in this case, the Guidelines range falls outside of Zone A.[5] Nevertheless, the Court finds that the circumstances of the offense and the

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[5] This is because the offense level in this case, based solely on drug quantity, subjects the Defendant to a final offense level of 19. Other courts have recognized, however, that for a variety of reasons, the Guidelines calculations based on drug amount may overrepresent the actual offense conduct. *See United States v. Smith*, 359 F. Supp. 2d 771, 776 (E.D. Wis. 2005) (noting that defendant's offense level would have been reduced by six levels if he was responsible for powder instead of crack cocaine); *United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 at *5 (N.D. Ind. Feb. 3, 2005) (describing the system of drug quantities as random as it is played out in reality); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1026 n.6 (D. Neb. 2005) (stating that "the quantity system was developed to punish bigger distributors more harshly, but practice of charging conspiracies over a long period of time has the result of aggregating many small distributions so as to make a long-term small quantity distributor look like a large-quantity distributor"). While not denigrating the seriousness of the crime in the present case, the Court finds the offense level, based solely on drug quantity, does not adequately reflect the offense conduct.

The Government argues that, because the offense level in this case is derived from the 1999 Guidelines and not a subsequent Guidelines, the Defendant already receives a benefit. Because, had the conduct occurred later, the Defendant would be subject to a higher sentencing range. This reasoning stems from harsher Guidelines sentencing ranges in drug trafficking cases based on drug amounts. This is no argument. The "benefit" of the 1999 calculation incurred by the Defendant was the result of his own decision to withdraw from the conspiracy. The Sentencing Commission did not raise the offense level associated with the same drug quantity in order to benefit those who had already committed the crime or to somehow reward them for engaging in earlier criminal conduct, but to reflect Congressional intent to toughen sentences for those involved in drug trafficking.

character of the Defendant, for the reasons set forth above, warrant a sentence of Probation as being sufficient, but not greater than necessary, to comply with the statutory mandates of 18 U.S.C. § 3553(a).

Dated this ___2nd___ day of June, 2005.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
Brian Michael Gall,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Steven M. Colloton took no part in the consideration or decision of this matter.

(5128-010199)

July 7, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit